Case No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

80-5645

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SUPREME COURT, U.S.

JOHNNY PAUL WITT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Petitioner, JOHNNY PAUL WITT, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Florida entered on July 24, 1980, rehearing denied on October 13, 1980.

QUESTIONS PRESENTED

I. Whether the Supreme Court of Florida violated the Supremacy Clause of the Constitution of the United States by refusing to consider Petitioner's claim in a collateral attack on his death sentence, based upon a change in constitutional

law emanating from the United States Court of Appeals for the Fifth Circuit in Smith v. Estelle, that the trial court violated Petitioner's Fifth and Fourteenth Amendment rights by admitting evidence of his incriminating statements to court-appointed psychiatrists in the absence of warnings that his statements could be used against him?

II. Whether the Supreme Court of Florida violated the Eighth and Fourteenth Amendments by refusing to consider Petitioner's claim in a collateral attack on his death sentence, based upon a change in constitutional law emanating from the Supreme Court of Florida in Elledge v. State, that the trial court subjected Petitioner to cruel and unusual punishment and denied him due process and equal protection of the law by considering nonstatutory aggravating circumstances in support of the death sentence?

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OPINION BELOW

The opinion of the Supreme Court of Florida is unreported and is set out in Appendix A.

JURISDICTION

The opinion of the Supreme Court of Florida was filed on July 24, 1980. Petitioner's timely motion for rehearing was denied on October 13, 1980, and this petition for certiorari was filed within sixty days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). Petitioner asserted below and is asserting here deprivation of his rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Supremacy Clause of Article VI and the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, which are set out in Appendix B.

2. This case involves Section 921.141, Florida Statutes (1973), which is set out in Appendix C.

3. This case involves Florida Rule of Criminal Procedure 3.850, which is set out in Appendix D.

STATEMENT OF THE CASE

In 1974, Petitioner was tried and convicted of murder. During the penalty phase of the trial, the court admitted the testimony of two court-appointed psychiatrists regarding Petitioner's incriminating statements to them and their conclusions based upon those statements. Following the jury's advisory verdict of death, the trial court imposed the death penalty. In support of the death penalty, the court found four aggravating circumstances, including

the nonstatutory factors of premeditation and propensity to commit crimes, and one mitigating circumstance. Petitioner's conviction and sentence were affirmed by the Supreme Court of Florida on direct appeal. Witt v. State, 342 So.2d 497 (Fla.1977). This Court denied certiorari on the question of whether a violation of Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968), had occurred during the selection of the jury. Witt v. Florida, 434 U.S. 935, 54 L.Ed.2d 294, 98 S.Ct. 422 (1977).

On November 2, 1979, Petitioner filed a motion to vacate the judgment and sentence under Florida Rule of Criminal Procedure 3.850 in the trial court. Petitioner's motion alleged that the death sentence was unconstitutional under new case law decided since his direct appeal. Petitioner claimed, inter alia, that the trial court's consideration of nonstatutory aggravating circumstances rendered the death sentence unconstitutional under the Eighth and Fourteenth Amendments and the decision of the Supreme Court of Florida in Elledge v. State, 346 So.2d 998 (Fla.1977). Petitioner also claimed that the admission of the psychiatrists' testimony regarding Petitioner's statements, in the absence of any warnings that his statements could be used against him, violated the Fifth and Fourteenth Amendments under the decision of the United States Circuit Court of Appeals for the Fifth Circuit in Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), cert.granted, __U.S.__, 63 L.Ed.2d 758, 100 S.Ct. 1311 (1980). The trial court held a nonevidentiary hearing on the motion to vacate on December 7, 1979, and entered an order denying the motion on December 11, 1979.

Petitioner prosecuted a timely appeal from the denial of the motion to vacate to the Supreme Court of Florida. On appeal, Petitioner argued, inter alia, that the trial court erred in denying the motion to vacate because the death sentence was unconstitutional for the reasons set forth

above. In an opinion filed July 24, 1980, the Supreme Court of Florida affirmed the denial of the motion to vacate. The court rejected the claim that the trial court's consideration of nonstatutory aggravating circumstances rendered the death sentence unconstitutional under the Eighth and Fourteenth Amendments on the ground that the change in law brought about by Elledge v. State, supra, was a nonconstitutional, evolutionary development in the law. The court rejected the claim that admission of the psychiatrists' testimony concerning Petitioner's incriminating statements, in the absence of warnings that his statements could be used against him, violated the Fifth and Fourteenth Amendments, on the ground that the change in law brought about by Smith v. Estelle, supra, emanated from an intermediate federal court and was therefore ineligible for consideration in a Rule 3.850 proceeding. Petitioner filed a timely motion for rehearing which was denied by the Florida Supreme Court on October 13, 1980.

REASONS FOR GRANTING CERTIORARI

I.

THE DECISION BELOW RAISES A FUNDAMENTAL AND RECURRING PROBLEM CONCERNING THE DUTY OF STATE COURTS, UNDER THE SUPREMACY CLAUSE OF THE CONSTITUTION OF THE UNITED STATES, TO RECOGNIZE AND RESPECT THE DECISIONS OF THE UNITED STATES COURTS OF APPEALS ON QUESTIONS OF FEDERAL LAW.

In Smith v. Estelle, 602 F.2d 694,709 (5th Cir. 1979), cert.granted, __U.S.__, 63 L.Ed.2d 758, 100 S.Ct. 1311 (1980), the United States Court of Appeals for the Fifth Circuit held that at the sentencing phase of a capital trial, a state may not use evidence based upon a psychiatric examination of the defendant unless the defendant was warned, before the examination, that he had a right to remain silent and was allowed to terminate the examination when he wished.

In his motion to vacate his death sentence under Florida Rule of Criminal Procedure 3.850, Petitioner claimed that the death sentence violated the Fifth and Fourteenth Amendments to the Constitution of the United States as construed in Smith v. Estelle, supra, because the trial court admitted the testimony of court-appointed psychiatrists regarding Petitioner's incriminating statements to them, in the absence of any warnings that his statements could be used against him. The trial court denied the motion. On appeal, the Supreme Court of Florida affirmed, holding that "only this Court and the United States Supreme Court can adopt a change of law sufficient to precipitate a post-conviction challenge to a final conviction and sentence." Witt v. State, __So.2d__ (Fla.Case No. 58,329, opinion filed July 24, 1980)(Appendix A, p.10 of opinion).

The Supreme Court of Florida's refusal to even consider Petitioner's claim that he was unconstitutionally

sentenced to death, for the sole reason that his claim was founded upon a change in law emanating from the Fifth Circuit rather than from this Court or one of its own decisions, calls into question the proper relationship between state and federal appellate courts. Does the Supremacy Clause of Article VI of the Constitution of the United States impose a duty upon state appellate courts to recognize and respect the decisions of federal appellate courts on questions of federal law?

> On principle, it would seem that where the highest federal authority on a question of federal law is not represented by an opinion of the United States Supreme Court but by a decision of a lower federal court, especially a federal Court of Appeals, a state court should be bound in the same way it is bound by an opinion of the United States Supreme Court.

20 Am.Jur.2d, Courts §230. This principle would seem to flow naturally and logically from the provisions of the Supremacy Clause of Article VI:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof...shall be the supreme law of the land; and the judges in every State shall be bound thereby; anything in the Constitution or laws of any State to the contrary notwithstanding.

Yet the state courts remain divided upon the question. Some state courts have held that they are bound by the decisions of federal appellate courts on questions of federal law. E.g., Ritchie v. Johnson, 158 Kan.103, 144 P.2d 925,935 (1944); Schueler v. Weintrob, 360 Mich. 621, 105 N.W.2d 42,48 (1960); Guzman v. Farrell Lines, Inc., 69 A.D.2d 802, 415 N.Y.S.2d 830,831 (App.Div. 1979); Beneficial Finance Co. of New York v. Bond, 83 Misc.2d 9, 372 N.Y.S.2d 374,379 (Sup.Ct. 1975); Schreiber v. Republic Intermodal Corp., 473 Pa. 614, 375 A.2d 1285,1288 n.5 (1977). A second group of state courts have held that the decisions of federal courts, other than this Court, are not binding, but are entitled to respectful consideration by state courts. E.g., State v.

Gates, 118 Ariz. 357, 576 P.2d 1357,1359 (1978); People v. Green, 94 Cal.App.3d Supp. 1, 156 Cal.Rptr. 713,716 n.3 (App.Dep't.Super.Ct. 1979); Cooper v. Morin, 91 Misc.2d 302, 398 N.Y.S.2d 36,53 (Sup.Ct. 1977), aff'd as modified, 49 N.Y.2d 69, 424 N.Y.S.2d 168 (1979); Howard v. United States, 566 S.W.2d 521,526 (Tenn. 1978); Woodard v. Texas Department of Human Resources, 573 S.W.2d 596,598 (Tex.Ct. App. 1978). A third group of state courts have held that decisions of federal appellate courts are persuasive, but not binding. E.g., Anderson v. Lester, 382 So.2d 1019 (La.3d Cir.Ct.App.(1980); Michigan Civil Rights Com'n v. Chrysler Corp., 80 Mich.App. 368, 263 N.W.2d 376,380 n.4 (Ct.App. 1977). A fourth group of state courts have simply held that they are not bound by the decisions of any federal court other than this Court. E.g., Clark v. State, 149 Ga. App. 641, 255 S.E.2d 110,114 (Ct.App. 1979); People v. Benson, 71 Ill.App. 3d 591, 390 N.E.2d 113,116 (App.Ct. 1979); Planned Parenthood of New York City, Inc. v. State Department of Institutions and Agencies, 75 N.J. 49, 379 A.2d 841,842 (1977).

The Supreme Court of Florida has been inconsistent in deciding whether it is bound by the decisions of federal appellate courts on questions of federal law. In Humphreys v. State ex rel. Palm Beach Co., 108 Fla. 92, 145 So. 858, 861 (1933), the court said that it was bound by the decisions of this Court and of other federal courts on questions of federal constitutional law. In State v. Dwyer, 332 So.2d 333,334-335 (Fla.1976), the court said that a decision of the Fifth Circuit holding a state statute unconstitutional was not binding on state courts and reversed the trial court for having followed the Fifth Circuit's decision. Yet in Mobile Oil Corp. v. Shevin, 354 So.2d 372,375 n.9 (Fla.1977), the court cited State v. Dwyer, supra, for the proposition that the Fifth Circuit's decision on a question of state law was not binding, then stated, "We recognize, of course, that

state courts are bound by federal court determinations of federal law questions."

The difficulties imposed upon litigants because of the Supreme Court of Florida's vacilating reluctance to accept the authority of the Fifth Circuit to decide questions of federal constitutional law are illustrated by the ten year long dispute over whether this Court's decision in Gideon v. Wainwright, 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792 (1963), required the appointment of counsel for indigent defendants charged with misdemeanors. In Fish v. State, 159 So.2d 866 (Fla.1964), the Supreme Court of Florida held that nothing in Gideon required the appointment of counsel in misdemeanor cases. In Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965), the Fifth Circuit held that the right to counsel applied in misdemeanor cases as well as felonies. In Watkins v. Morris, 179 So.2d 348 (Fla.1965), the Supreme Court of Florida expressly declined to follow Harvey. In Boyer v. City of Orlando, 402 F.2d 966 (5th Cir. 1968), the Fifth Circuit denied federal habeas relief to an uncounseled indigent convicted and sentenced for a misdemeanor because the court assumed that the Florida courts would respect the recent decisions of the Fifth Circuit and grant relief to Mr. Boyer. Yet the Supreme Court of Florida denied relief in Boyer v. City of Orlando, 238 So.2d 84 (Fla.1970). Ultimately, the dispute had to be resolved by this Court in Argersinger v. Hamlin, 407 U.S. 25, 32 L.Ed.2d 530, 92 S.Ct. 2006 (1972).

In order to avoid future disputes between state and federal courts and the concommitant difficulties imposed upon litigants, this Court should grant certiorari in this case in order to decide whether the Supremacy Clause requires state courts to respect and abide by the decisions of federal appellate courts on questions of federal constitutional law.

II.

THE DECISION BELOW RAISES THE SIGNIFICANT AND RECURRING QUESTION OF WHETHER RELIANCE UPON NONSTATUTORY AGGRAVATING CIRCUMSTANCES IN SENTENCING A PERSON TO DEATH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

This Court has ruled that imposition of the death penalty under sentencing procedures which create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner violates the Cruel and Unusual Punishment Clause of the Eighth Amendment, made applicable to the states by the Fourteenth Amendment. Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972). Accord, Godfrey v. Georgia, __U.S.__, 64 L.Ed.2d 398,405-406, 100 S.Ct. 1759 (1980). In Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976), this Court found that the capital sentencing procedures provided by Section 921.141, Florida Statutes, facially satisfied the requirements of Furman because the sentencing authority's discretion was guided and channeled by requiring examination of specific aggravating and mitigating factors and because the Supreme Court of Florida's appellate review of death sentences guaranteed that they were consistent with other sentences imposed in similar circumstances.

In Elledge v. State, 346 So.2d 998,1002-1003 (Fla. 1977), the Supreme Court of Florida ruled that the reversal of a death sentence based in part on nonstatutory aggravating circumstances, where there are also mitigating circumstances present, is necessary in order to satisfy the requirements of Furman and Proffitt. The court followed the Elledge rule in several subsequent cases. E.g., Lewis v. State, 377 So.2d 640 (Fla.1979); Fleming v. State, 374 So.2d 954 (Fla.1979); Miller v. State, 373 So.2d 882 (Fla.1979); Mikenas v. State, 367 So.2d 606 (Fla.1978); Riley v. State, 366 So.2d 19 (Fla.1978).

In his motion to vacate his death sentence under Florida Rule of Criminal Procedure 3.850, Petitioner claimed that the death sentence violated the Eighth and Fourteenth Amendments, as construed in Elledge v. State, supra, because the trial court had relied in part upon the nonstatutory aggravating circumstances of premeditation and propensity to commit crime, and there was at least one mitigating circumstance. The trial court denied the motion. On appeal, the Supreme Court of Florida affirmed on the ground that the change in law represented by Elledge v. State was a nonconstitutional, evolutionary development in the law, arising from the court's case-by-case application of Florida's death penalty statute. Witt v. State, supra (Appendix A, at pages 2 and 10 of opinion).

The Supreme Court of Florida's refusal to consider Petitioner's claim that he was unconstitutionally sentenced to death because of the trial court's reliance on nonstatutory aggravating circumstances seriously erodes the basis upon which this Court found Florida's capital sentencing procedure constitutional in Proffitt v. Florida, supra. In this case, the sentencing authority's discretion was not guided and channeled by requiring examination of only those specific aggravating circumstances authorized by Section 921.141(5), Florida Statutes (1973). Nor did the Florida Supreme Court guarantee that the same result would be reached under similar circumstances. The circumstances in the present case are substantially the same as the circumstances in Elledge v. State, supra, and its progeny, yet Petitioner's death sentence was affirmed, while the death sentences of those similarly situated were reversed.

The decision below conflicts in principle with the decision of the United States District Court for the Middle District of Florida in Henry v. Wainwright, __F.Supp. __ (M.D.Fla.Case No. 79-584, opinion filed February 14, 1980)(unreported opinion set out in Appendix E). Henry

petitioned for federal habeas corpus relief from a death sentence imposed by a Florida trial court. The district court held that Henry was entitled to a new sentencing hearing because the trial court had improperly instructed the jury that the aggravating factors which they could consider in rendering their advisory sentencing verdict were not limited to those factors specified in Section 921.141(5), Florida Statutes (1973). The district court found a due process and equal protection violation which was not rendered harmless by the absence of any mitigating circumstances.

Because the Supreme Court of Florida refuses to allow collateral attacks on death sentences on the ground that the trial court relied upon nonstatutory aggravating circumstances, while the United States District Court has demonstrated its willingness to grant federal habeas relief on similar grounds, other Florida prisoners with claims similar to those of Petitioner and Henry will be compelled to seek relief in the federal courts. As a result, the federal courts will be burdened with the responsibility of deciding constitutional claims which could have been resolved by the Florida courts.

Moreover, the question of whether reliance upon nonstatutory aggravating circumstances in sentencing a person to death violates the Eighth and Fourteenth Amendments is not unique to Florida. It is a question which will arise in virtually every state which authorizes the death penalty. In those states where the problem of reliance on nonstatutory or improper aggravating circumstances has been considered, the courts have divided on the resolution of the issue. Alabama and North Carolina courts have required a new sentencing hearing where the sentencing authority relied in part upon nonstatutory or improper aggravating circumstances, although neither court addressed the

question of whether such reliance would violate the Eighth and Fourteenth Amendments. Bufford v. State, 382 So.2d 1162, 1173-1175 (Ala.Crim.App. 1980), cert.denied, 382 So.2d 1175 (Ala.1980); State v. Cherry, 298 N.C. 86, 257 S.E.2d 551, 567-568 (1979). Arizona, Georgia, and Nebraska courts have affirmed death sentences where the sentencing authority relied in part on nonstatutory or improper aggravating circumstances, again without addressing the constitutional issue. State v. Steelman, 612 P.2d 475,481-483 (Ariz.1980); Gates v. State, 244 Ga. 587, 261 S.E.2d 349,357-358 (1979); State v. Peery, 199 Neb. 656, 261 N.W.2d 95,104-106 (1977), cert.denied, 439 U.S. 882, 58 L.Ed.2d 194, 99 S.Ct. 220 (1978). The Supreme Court of Louisiana has affirmed a death sentence upon finding that one of three aggravating circumstances relied upon by the jury was proper, despite a strong dissent arguing that a new sentencing hearing was constitutionally mandated because two of the aggravating circumstances relied upon were not supported by the record. State v. Williams, 383 So.2d 369 (La.1980). The Supreme Court of Utah has expressly approved of reliance upon a nonstatutory aggravating factor in support of a death sentence without discussing the constitutional issue. State v. Codianna, 573 P.2d 343,352-353 (Utah 1977), cert.denied, 439 U.S. 882, 58 L.Ed.2d 194, 99 S.Ct. 219 (1978).

In order to avoid further erosion of the principles of Furman v. Georgia and Proffitt v. Florida, supra, and to resolve the conflict of authority developing among state and federal courts, this Court should grant certiorari in order to decide whether reliance upon nonstatutory aggravating circumstances in sentencing a person to death violates the Eighth and Fourteenth Amendments and requires the granting of collateral relief.

III.

THE SUPREME COURT OF FLORIDA'S EVASION OF ITS DUTY TO DECIDE CONSTITUTIONAL ISSUES THREATENS TO IMPOSE AN UNREASONABLE BURDEN UPON FEDERAL COURTS.

State courts, as well as federal, have a duty to decide constitutional issues and to safeguard the personal liberties secured by the Constitution of the United States. See Stone v. Powell, 428 U.S. 465, 493 n.35, 49 L.Ed.2d 1067,1087 n.35, 96 S.Ct. 3037 (1976); Schneckloth v. Bustamonte, 412 U.S. 218,259, 36 L.Ed.2d 854,881, 93 S.Ct. 2041 (1973)(Powell, J., concurring); Brennan, Some Aspects of Federalism, 39 N.Y.U.L.Rev. 945,947 (Dec., 1964); Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv.L.Rev. 441,510-511 (Jan., 1963). As set forth in points I and II, the Supreme Court of Florida evaded its responsibility to decide the constitutional issues raised in Petitioner's appeal from the denial of his motion to vacate his death sentence by refusing to consider a change in federal constitutional law emanating from the Fifth Circuit in Smith v. Estelle, supra, and by labeling Petitioner's Eighth and Fourteenth Amendment claim under Elledge v. State, supra, nonconstitutional.

The Supreme Court of Florida's action in refusing to consider Petitioner's constitutional claims impairs the availability of collateral relief from an unconstitutionally imposed death sentence in the state courts. This Court has applied the principle that there is no higher duty than to maintain the writ of habeas corpus unimpaired in ruling that a state cannot impose financial barriers to the availability of collateral relief in state courts. Smith v. Bennett, 365 U.S. 708,713, 6 L.Ed.2d 39,43, 81 S.Ct. 895 (1961). Similarly, the Supreme Court of Florida should not be permitted to impair the availability of collateral relief by evading its duty to decide constitutional issues.

The necessary consequence of the Florida court's evasion of its duty to decide constitutional issues in collateral attacks on death sentences is that Florida prisoners under sentence of death will have to petition the federal courts for habeas corpus relief in order to seek vindication of their constitutional claims. Since there are currently 151 Florida prisoners under sentence of death, Death Row, 1 Death Penalty Rptr. 19,20-22 (Sept.,1980), with many more death sentences being imposed every year, this will impose a substantial burden on the federal courts, especially when the painstaking care accorded capital cases in federal courts is taken into consideration. Moreover, the courts in other states may follow the Florida court's example and leave the vindication of constitutional claims by their death-sentenced prisoners to the federal courts.

Habeas corpus petitions already threaten to overburden the federal courts and have a deleterious effect upon the relationship between state and federal courts. Rose v. Mitchell, 443 U.S. 545,583-585, 61 L.Ed.2d 739,767-768, 99 S.Ct. 2993 (1979)(Powell, J., concurring). See also, Townsend v. Sain, 372 U.S. 293,319, 9 L.Ed.2d 770, 789, 83 S.Ct. 745 (1963). Yet conventional notions of finality have no place where life or liberty is at stake and the violation of constitutional rights is alleged, Sanders v. United States, 373 U.S. 1,8, 10 L.Ed.2d 148,157, 83 S.Ct. 1068 (1963), so some procedure for the vindication of such claims must be available. Since state courts have a co-equal responsibility to decide constitutional issues and safeguard personal liberties, the most effective way to avoid excessive burdens on federal courts and unneccessary friction between the state and federal courts would be to provide adequate procedures for collateral relief in the state courts. Meador, Accomodating State Criminal Procedure and Federal Post-conviction Review, 50 A.B.A.J. 928

(Oct.,1964); Brennan, Some Aspects of Federalism, supra. Therefore, this Court should grant certiorari to review the decision of the Supreme Court of Florida in this case in order to correct that court's evasion of its duty to consider Petitioner's constitutional claims and to prevent the imposition of excessive and unnecessary burdens upon lower federal courts.

CONCLUSION

For these reasons, Petitioner respectfully requests this Honorable Court to issue a writ of certiorari to review the judgment and opinion of the Supreme Court of Florida.

Respectfully submitted,

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Case No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOHNNY PAUL WITT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDICES
PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

APPENDIX

Appendix A	Opinion of the Supreme Court of Florida in Witt v. State, ___ So.2d ___ (Fla. Case No. 58,329, opinion filed July 24, 1980).
Appendix B	Supremacy Clause of Article VI, Fifth, Eighth, and Fourteenth Amendments, Constitution of the United States.
Appendix C	Section 921.141, Florida Statutes (1973).
Appendix D	Florida Rule of Criminal Procedure 3.850.
Appendix E	Opinion of the United States District Court in Henry v. Wainwright, ___ F.Supp. ___ (M.D.Fla.Case No. 79-584, opinion filed February 14, 1980).

Case No.

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APPENDICES
PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 58,329

JOHNNY PAUL WITT, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[July 24, 1980]

PER CURIAM

In 1974, Johnny Paul Witt was tried and convicted of first-degree murder for the killing of Jonathan Kushner. The trial judge accepted the jury's recommendation that Witt be sentenced to death and, on appeal to this Court, the trial court's judgment of conviction and sentence were affirmed. Witt v. State, 342 So.2d 497 (Fla.), cert. denied, 434 U.S. 935 (1977); reh. denied, 434 U. S. 1026 (1978). Witt subsequently sought post-conviction relief in the trial court pursuant to Florida Rule of Criminal Procedure 3.850,[1] which was denied. He now seeks review of that denial.

By this appeal Witt raises essentially six issues, all of which he admits either were raised in the direct appeal from his conviction and sentence, or could have been raised at that time. He predicates his appeal on alleged changes in case law since his first appeal was concluded, asserting the right to obtain the benefits of subsequent, favorable case law developments relating to capital punishment and to criminal law generally. The particular changes which Witt presents for our consideration are these:

EXHIBIT A

(1) an alleged change in the law relative to sentencing, reflected primarily in Elledge v. State, 346 So.2d 998 (Fla. 1977), concerning the significance of improper aggravating circumstances where at least one mitigating circumstance has been found to exist;

(2) an alleged change in the law relative to sentencing, reflected in Hall v. State, 381 So.2d 683 (Fla. 1979), concerning the requirements for a written enumeration of the findings in aggravation and mitigation;

(3) an alleged change in the law relative to sentencing, reflected in Shue v. State, 366 So.2d 387 (Fla. 1978), and in Burch v. State, 343 So.2d 831 (Fla. 1977), concerning definitions for the mitigating circumstances set out in sections 921.141(b), (e), and (f), Florida Statutes (1979);

(4) an alleged change in the law, reflected in Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), cert. granted, ___ U.S. ___, 100 S.Ct. 1311 (1980), making inadmissible in a sentencing proceeding statements made during a court-ordered psychiatric examination not preceded by Miranda warnings;

(5) an alleged change in the law, reflected by an aggregation of the individual opinions in Lockett v. Ohio, 438 U.S. 586 (1978), requiring that the state, before imposing the death penalty, establish that the defendant intended to kill the victim; and

(6) an alleged change in the law, reflected in Brewer v. Williams, 430 U.S. 387 (1977), relating to the efficacy of a defendant's waiver of his right to counsel.

The underlying issue posed by this appeal, however, concerns the significance of a change in decisional law on the finality of a fully-adjudicated capital case. Simply stated, we are confronted with a threshold decision as to when a change of decisional law mandates a reversal of a once valid conviction and sentence of death. The issue is a thorny one, requiring that we resolve a conflict between two important goals of the criminal

justice system—ensuring finality of decisions on the one hand, and ensuring fairness and uniformity in individual cases on the other—within the context of post-conviction relief from a sentence of death.

The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases. There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just. Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole.[2]

Post-conviction relief procedures, such as those authorized by our Rule 3.850, offer an avenue to challenge a once final judgment and sentence in limited instances, and for limited reasons. The United States Supreme Court recently noted:

> It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment. The reasons for narrowly limiting the grounds for collateral attack on final judgments are well known and basic to our adversary system of justice.*
>
> *Inroads on the concept of finality tend to undermine confidence in the integrity of our procedures . . . . Moreover, [the] increased volume of judicial work associated with the processing of collateral attacks inevitably impairs and delays the orderly administration of justice. Because there is no limit on the time when a collateral attack may be made, evidentiary hearings are often inconclusive and retrials may be impossible if the attack is successful . . . .

United States v. Addonizio, 442 U.S. 178, 184 & n. 11 (1979)(footnote omitted). See also Linkletter v. Walker, 381 U.S. 618, 637-38 (1965). The law's concern for finality of decisions is in no way diminished by the availability and utilization of a collateral remedy such as Rule 3.850.[3]

The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases."[4]

Unfortunately, drawing or defining the line where finality gives way to fairness based on a change of law is no simple task. The United States Supreme Court has struggled with this problem, developing what has been characterized as a "staggeringly intricate body of law governing the question whether new constitutional doctrines should be 'retroactively' or 'prospectively' applied."[5] Indeed, one former member of that court has characterized the course of law in this area as "almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim." Mackey v. United States, 401 U.S. 667, 676 (1971) (Harlan, J., concurring in part and dissenting in part).

Without attempting to survey this relatively unsatisfactory body of law,[6] we note that the essential considerations in determining whether a new rule of law should be applied retroactively are essentially three: (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule. Stovall v. Denno, 388 U.S. 293, 297 (1967); Linkletter v. Walker, 381 U.S. 618 (1965); Brewer v. State, 264 So.2d 833, 834 (Fla. 1972); State v. Steinhauer, 216 So.2d 214, 219 (Fla. 1968), cert. denied, 398 U.S. 914 (1970).

A determination that a new principle of law should be fully retroactive may mandate its recognition and application on

collateral review. Thus, in this proceeding we must balance the interests of fairness and uniformity for Johnny Paul Witt against the interests of decisional finality, in the context of alleged subsequent favorable changes of law. The balancing problem is presented squarely here, for there are no bases for Witt's collateral attack which are independant of alleged law changes.

The general difficulty of resolving the conflicting interests presented by law changes is heightened by the fact that this is a capital case. Uniquely, capital punishment, on the one hand, connotes special concern for individual fairness because of the possible imposition of a penalty as unredeeming as death.[7] On the other hand, both the frequency of Florida "law changes" involving our relatively new capital punishment statute,[8] and the unavoidable delay in deciding these cases,[9] suggest that finality will be illusory if each convicted defendant is allowed the right to relitigate his first trial upon a subsequent change of law. Cf. Godfrey v. Georgia, 48 U.S.L.W. 4541, 4551 (U.S. May 19, 1980)(No. 78-6899)("[T]he majority today endorses the argument that I thought we had rejected in Gregg: namely, 'that no matter how effective the death penalty may be as a punishment, goverment [sic], created and run as it must be by humans, is inevitably incompetant to administer it.'")(White, J., dissenting).

We know that the outcome of a capital case may depend upon the speed with which the trial and the appellate process progress. A variety of reasons may account for the time disparities involved in concluding judicial labors with regard to individuals found guilty of capital crimes and sentenced to death. Trials are delayed for one reason or another. Appeals are not prosecuted with equal diligence. Our ability to review any case varies with the complexity of the issues, the amount of disagreement among the members of the court, the arrival of cases presenting comparable or relevant legal issues, the volume of our other work, and numerous other obvious reasons. It has been suggested that delay could result from a factor as minor as a common cold.[10]

Because the mere passage of time brings inevitable, attendant refinements of the law, disparities of result on direct

review are unavoidable.[11] We know, then, that if there were to be absolute uniformity and fairness in the application of our capital punishment law, all relevant changes of law would have to be recognized in post-conviction relief proceedings.

In considering the ideal of individual fairness in capital cases, however, two countervailing considerations must be weighed. First, if punishment is ever to be imposed for society's most egregious crimes, the disposition of a particular case must at some point be considered final notwithstanding a comparison with other individual cases. Second, we cannot ignore the purpose for our post-conviction relief procedure in cases where a death penalty has been imposed, for Florida's post-conviction relief rule came about as a narrow response to Gideon v. Wainwright, 372 U.S. 335 (1963). That decision , it will be recalled, first announced that each state must provide counsel to every indigent defendant charged with a felony at all critical stages of the proceeding. The Gideon decision constituted a change of law of such magnitude that it was applied retroactively in order to remedy the basic constitutional injustice of prior felony trials without counsel.[12]

This Court promptly responded to Gideon, adopting a procedure just fourteen days after the decision to allow prisoners the opportunity and a forum to challange those prior convictions which might be affected by Gideon's law change.[13] The procedural rule spawned by Gideon became Rule 3.850. Quite clearly, the main purpose for Rule 3.850 was to provide a method of reviewing a conviction based on a major change of law, where unfairness was so fundamental in either process or substance that the doctrine of finality had to be set aside. To the extent we permit this rule to be used as a second procedure to balance individual applications of the death penalty--our first being on direct review of the conviction and sentence--the limited historical role for post-conviction proceedings becomes distended. For the policy reasons which underpin the finality of decisions, and

because the imposition of any death penalty would be averted by a different construction of our rule, we now declare our adherence to the limited role for post-conviction relief proceedings, even in death penalty cases.

The issues brought to us in this appeal are asserted by Witt to be based, essentially, on two judicial decisions involving changes of law—Davis v. United States, 417 U.S. 333 (1974), and Vertree v. Wainwright, 184 So.2d 420 (Fla. 1966). The latter is purely an application of the limited role for post-conviction relief which was spawned by Gideon, for Vertree authorized collateral review based on a change of law reflected in a case which had held that post-conviction relief was available to determine the voluntariness of a defendant's guilty plea when he was not properly apprised of his right to counsel.[14] The Supreme Court's Davis decision, however, is not so easily classified.

Davis was convicted and sentenced for refusing to obey an order of induction, despite his claim that the regulation authorizing his induction was not validly authorized by statute. Davis' claim was rejected on appeal by a panel of the court of appeals, and his conviction was affirmed. Later, a different panel of the same court of appeals upheld the same claim Davis had made in a similar, but unrelated, case. Davis then sought collateral review of his conviction and sentance under 28 U.S.C. § 2255, the federal post-conviction relief statute.[15] On certiorari review, the United States Supreme Court held that Davis' claim—a nonconstitutional change of law resulting from an inconsistent opinion by another panel of the same court of appeals—was cognizable on collateral review under § 2255, so long as the asserted change or error is a "fundamental defect which inherently results in a complete miscarriage of justice" and "presents exceptional circumstances where the need for the remedy . . . is apparent." 417 U.S. at 346 (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).[16] The application of Davis in Florida is suggested because our rule 3.850 was modeled after 28

U.S.C. § 2255, and constructions of the federal statute have generally been considered persuasive for questions which arise under the Florida rule.[17]

We start by noting that we are not obligated to construe our rule concerning post-conviction relief in the same manner as its federal counterpart, at least where fundamental federal constitutional rights are not involved.[18] First, the concept of federalism clearly dictates that we retain the authority to determine which "changes of law" will be cognizable under this state's post-conviction relief machinery. Second, we know of no constitutional requirement that the scope of Rule 3.850 be fully congruent with that of the analogous federal statute. A limited role for the rule in no way abridges the federal due process right to be heard, since state prisoners will still be free to seek collateral relief in the federal courts under that system's seemingly more relaxed standards.[19] In fact, several commentators have argued forcefully that state courts should narrow their grounds for collateral relief because of the duality of review,[20] and at least one state has limited post-conviction relief narrowly to constitutional claims.[21]

Not being required to accord Davis breadth to post-conviction proceedings under our rule, we decline to do so.[22] To allow non-constitutional claims as bases for post-conviction relief is to permit a dual system of trial and appeal, the first being tentative and nonconclusive. Our justice system could not accommodate such an expansion; our citizens would never tolerate the deleterious consequences for criminal punishment, deterrence and rehabilitation. We reject, therefore, in the context of an alleged change of law, the use of post-conviction relief proceedings to correct individual miscarriages of justice or to permit roving judicial error corrections, in the absence of fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding.[23]

We emphasize at this point that only major constitutional changes of law will be cognizable in capital cases under Rule 3.850.[24] Although specific determinations regarding the significance of various legal developments must be made on a case-by-case basis, history shows that most major constitutional changes are likely to fall within two broad categories. The first are those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties. This category is exemplified by Coker v. Georgia, 433 U.S. 584 (1977), which held that the imposition of the death penalty for the crime of rape of an adult woman is forbidden by the eighth amendment as cruel and unusual punishment. The second are those changes of law which are of sufficient magnitude to necessitate retroactive application, as ascertained by the three-fold test of Stovall and Linkletter.[25] Gideon v. Wainwright, of course, is the prime example of a law change included within this category.[26]

In contrast to these jurisprudential upheavals are evolutionary refinements in the criminal law, affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters. Emergent rights in these categories, or the retraction of former rights of this genre, do not compel an abridgement of the finality of judgments. To allow them that impact would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit.[27]

Incidental to the notion of what constitutes a law change for post-conviction relief purposes is the problem of what courts bring about such changes. Even within the narrow area of major constitutional law changes, there must be some restriction on the number of tribunals which can adopt law changes sufficient to warrant relief in post-conviction proceedings.[28] The reason is

obvious. In Florida alone there are 500 trial court judges, 39 district court judges sitting in panels of three on five appellate courts, and the supreme court. Little finality would attend criminal convictions if each of these tribunals was an eligible source of law change. Similar considerations apply to the host of federal and other non-Florida judges from whom new "law" might emerge. Consequently, we hold that only this Court and the United States Supreme Court can adopt a change of law sufficient to precipitate a post-conviction challenge to a final conviction and sentence.[29]

Applying these principles to the present case, we find that Witt may not raise most of the matters he has presented by way of collateral attack on his original conviction and sentence. Witt's first, second, and third alleged law changes are nonconstitutional, evolutionary developments in the law, arising from our case-by-case application of Florida's death penalty statute. Being of that genre, they may not be raised in this proceeding. His fourth alleged law change emanates from an intermediate federal court and is likewise ineligible for consideration in a 3.850 proceeding.[30] Witt's fifth alleged law change, although arguably constitutional in nature and emanating from a proper court, is not in fact a "change of law" inasmuch as it is not a precedent.[31]

Witt's sixth alleged law change—the development reflected in Brewer v. Williams, 430 U.S. 387 (1977)—is the only claim which, on its face, could qualify for relief under Rule 3.850. Normally, we would now determine whether Brewer should be retroactively applied to the instant case under the three-part test of Stovall and Linkletter. That exercise would be futile, however, for the factual predicate for Witt's sixth claim precludes any benefit for Witt even if Brewer were retroactively applied. The Supreme Court in Brewer did not hold that a defendant may not waive his right to counsel after requesting an attorney. Rather, it merely found that, under the circumstances,

that defendant had not done so and the state had failed to meet its burden of proving "an intentional relinquishment or abandonment of a known right or privilege." Id. at 404 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). In contrast, we specifically held on Witt's direct appeal that Witt had waived his right to counsel and that "the heavy burden of demonstrating that the defendant knowingly and intelligently waived . . . his right to counsel . . . was met under the circumstances in this case." Witt v. State, 342 So.2d at 500. Witt's request for certiorari was denied by the United States Supreme Court. That confirmed, factual determination is now the "law of the case," and as such is ineligible for reevaluation in order to now raise a legal issue under Brewer v. Williams for retroactive application.

To summarize, we today hold that an alleged change of law will not be considered in a capital case under Rule 3.850 unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance. Most law changes of "fundamental significance" will fall within the two broad categories described earlier.

For the reasons expressed, the order of the trial court denying Witt any relief in his 3.850 proceeding is affirmed. The stay of execution ordered on May 14 is hereby vacated.

It is so ordered.

SUNDBERG, C.J., ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., Concur
ENGLAND, J., Concurs with an opinion

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

1. In relevant part, Rule 3.850 reads as follows:

> A prisoner in custody under sentence of a court established by the laws of Florida claiming the right to be released upon the ground that the judgment was entered or that the sentence was imposed in violation of the Constitution or Laws of the United States, or of the State of Florida, or that the court was without jurisdiction to enter such judgment or to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or that his plea was given involuntarily, or the judgment or sentence is otherwise subject to collateral attack, may move the court which entered the judgment or imposed the sentence to vacate, set aside or correct the judgment or sentence.

Fla. R. Crim. P. 3.850.

2. See Hankerson v. North Carolina, 432 U.S. 233, 246-48 (1977) (Powell, J., concurring); Mackey v. United States, 401 U.S. 667, 681-92 (1971) (Harlan, J., concurring); Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting); Brown v. Allen, 344 U.S. 443, 536-48 (1953) (Jackson, J., concurring). Accord, Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 444-53 (1963).

3. See also ABA Standards Relating To Post-Conviction Remedies 3 (Approv. Draft 1968) ("A general principle underlying these standards is that once an issue of fact or law has been finally determined, that adjudication ought to be final and binding.").

4. Id. at 37.

5. P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts And The Federal System 1477 (2d ed. 1973) [hereinafter cited as Hart & Wechsler].

6. The retroactivity-prospectivity problem has produced a vast array of scholarly literature. See, e.g., Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963); Meador, Habeas Corpus and the "Retroactivity Illusion," 50 Va. L. Rev. 1115 (1964); Mishkin, Foreward: The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1965); Schwartz, Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 Chi. L. Rev. 719 (1966); Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 Yale L.J. 221 (1973).

7. It bears mention that the constitutionality of Florida's capital sentencing procedures, § 921.141, Florida Statutes (1979), is contingent upon this Court's role of reviewing each case to ensure uniformity in the imposition of the death penalty. See Proffitt v. Florida, 428 U.S. 242, 258-59 (1976).

8. Florida's death penalty statute was enacted in 1973. This Court has decided 140 capital appeals under the statute in the last 6 years and had 112 additional death penalty appeals pending as of May 1, 1980.

disposition. See, e.g., Gafford v. State, No. 48,421 (Fla. June 12, 1980).

10. Schaefer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N.Y.U.L. Rev. 631, 645 (1967).

11. See Davis v. United States, 417 U.S. 333, 368 (1974)(Rehnquist, J., dissenting).

12. See Linkletter v. Walker, 381 U.S. 618, 628 n.13 (1965).

13. In Re Criminal Procedure Rule No. 1, 151 So.2d 634 (Fla. 1963). As the Court noted in Roy v. Wainwright, 151 So.2d 825, 826-27 (Fla. 1963), the rule was designed to relieve the burdens on Florida's courts after Gideon by making "procedural facilities available to state prisoners who might have belatedly acquired rights which were not recognized at the time of their conviction."

14. See Mason v. State, 176 So.2d 76 (Fla. 1965).

15. We have simplified our discussion of the procedural history of Davis for purposes of clarity and convenience. For a complete treatment, see Davis v. United States, 417 U.S. 333, 334-41 (1974).

16. The Court found that Davis' claim qualified under this test. Id. at 347.

17. See Roy v. Wainwright; Reddick v. State, 190 So.2d 340 (Fla. 2d DCA 1966).

18. For an historical analysis of § 2255, see United States v. Hayman, 342 U.S. 205, 210-19 (1952).

19. See Comment, State Court Withdrawal From Habeas Corpus, 114 U. Pa. L. Rev. 1081, 1089 (1966).

20. See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 168 (1970)("[W]hen a state has done what it considers right and has met due process standards, it should not feel obligated to do more merely because federal habeas may be available in some cases where it declines to allow state collateral attack.")(emphasis in original); Comment, supra note 20.

21. See Commonwealth v. Rightnour, 469 Pa. 107, 364 A.2d 927 (1976)(4-3 decision).

22. It goes almost without saying that our rejection of Davis where a death penalty is involved connotes its rejection in less severe cases.

23. Aside from our disinclination to follow Davis' seeming breadth, we believe its refined scope would not benefit Johnny Paul Witt on this appeal. In more recent decisions the United States Supreme Court and various lower federal courts have given Davis a restrictive reading, limiting its application to those situations where a nonconstitutional law change thoroughly undermines the substantive basis of the prior conviction such that the conduct for which the petitioner is being punished is no longer illegal. See United States v. Addonizio, 442 U.S. 178, 185-87 (1979); Stone v. Powell, 428 U.S. 465, 477 n.10 (1976); United States ex rel. Machi v. United States Dept. of Prob. & Parole, 536 F.2d 179 (7th Cir. 1976); United States v. Loschiavo, 531 F.2d 659 (2d Cir. 1976); United States v. Travers, 514 F.2d 1171 (2d Cir.

Availability of Federal Post-Conviction Relief In Light Of A Subsequent Change In Law, 66 Jour. Crim. L. & Criminology 117 (1975). Tested against this more refined standard, Witt's alleged law changes provide no basis to upset his conviction or sentence.

24. It should be noted that our analysis is applicable only to those situations where a change of law is asserted as a ground for collateral relief under Rule 3.850. Post-conviction claims involving the other enumerated grounds of Rule 3.850--for example, a claim that the trial court was without jurisdiction--need not be of constitutional stature in order to provide a viable basis for relief. Indeed, the majority of cases under Rule 3.850 have not involved changes of law, and those cases will not be affected by today's holding.

25. This category of law changes was adapted from Section 2.1(a)(vi) of the ABA Standards Relating to Post-Conviction Remedies (Approv. Draft 1968), which provides in relevant part:

> A post-conviction remedy ought to be sufficiently broad to provide relief
>
> (a) for meritorious claims challenging judgments of convictions, including claims:
>
> . . . .
>
> (vi) that there has been a significant change in law, whether substantive or procedural, applied in the process leading to applicant's conviction or sentence, where sufficient reasons exist to allow retroactive application of the changed legal standard;
>
> . . . .

26. Compare Gideon with Linkletter v. Walker, 381 U.S. 618 (1965), wherein the Supreme Court refused to give retroactive application to the newly-announced exclusionary rule of Mapp v. Ohio, 367 U.S. 643 (1961).

27. Florida's voters recently reaffirmed their commitment to a criminal justice system which accommodates only one appeal as a matter of right when they amended the judiciary article of the constitution to eliminate some aspects of this Court's jurisdiction which had become the equivalent of full, second appeals. See England, Hunter, & Williams, An Analysis of the 1980 Jurisdictional Amendment, 54 Fla. B.J. 406 (1980).

28. See Davis v. United States, 417 U.S. 333, 360-61 (1974) (Rehnquist, J., dissenting).

29. It is interesting to note that commentators have been uniformly critical of the Supreme Court's conclusion in Davis that an inconsistent opinion of another panel of the same court of appeals can constitute a "change of law." See, e.g., Hart & Wechsler at 268 (1977 Supp.); The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 220 (1974) ("By permitting collateral review under section 2255 in response to a nonauthoritative decision . . . the Supreme Court appears to have unjustifiably extended the concept of change of law.") (footnote omitted).

state and federal court systems.

Although we do not address the merits of Witt's argument concerning Smith v. Estelle, we note that the state contests its applicability to Witt's trial on multiple grounds.

31. The aggregation of separate judicial opinions in a case does not produce a law-changing precedent. See Greene v. Massey, No. 57,207 (Fla. May 8, 1980).

ENGLAND, J., concurring.

I write to comment on the significance of today's decision, for I have no illusions as to its reach. The legislature and the United States Supreme Court have determined that capital punishment is permissible for certain crimes committed in Florida. By adopting a pragmatic approach to post-conviction relief proceedings, the Court has in essence created a procedural means under state law by which executions can take place.[1] I am convinced that the adoption of any other approach would be tantamount to a judicial invalidation of Florida's capital punishment statute, for no executions would take place if "change of law" were defined to include any refinement in the capital punishment statute or any nonconstitutional change of law. Under such definitions there would never be a time when a defendant facing execution could not identify a law change sufficient to initiate a collateral attack on his sentence and conviction.

The heightened problem of law changes in Florida's capital punishment scheme is exemplified by a look at only two cases from among our many. Sawyer v. State, 313 So.2d 680 (Fla. 1975), cert. denied, 428 U.S. 911 (1976), and Brown v. State, 367 So.2d 616 (Fla. 1979), illustrate the point that the outcome of a capital case may depend simply upon the speed with which the trial and the appellate process progress.

Anthony Sawyer was convicted and sentenced to death for the January 1973 killing of a liquor store owner's son in Dade County. While the jury recommended a life sentence, the trial judge imposed a sentence of death, citing additional facts not available to the jury as the basis for overriding its recommendation. An appeal was filed in November 1973 and, finding no reversible error, this Court affirmed both the conviction and sentence in February 1975. Under standards subsequently developed, three of the four aggravating factors would have been rejected.[2] My review of the record of Sawyer's trial suggests that his sentence in all probability would today be vacated, and that a life sentence would be imposed or the case remanded for resentencing.

Henry Brown was also sentenced to death in connection with a 1973 Dade County murder—the August 1973 killing of an elderly man who had just cashed his social security check. As in Sawyer, the jury recommended a life sentence and the trial judge imposed a sentence of death on the basis of four aggravating circumstances. One mitigating factor was also found to exist. An appeal was not filed in this Court until October 1975. In 1979, we vacated Brown's death sentence and ordered the entry of a life sentence, based primarily on our intervening decision concerning the significance of a jury's life recommendation. See Tedder v. State, 322 So.2d 908 (Fla. 1975).

The consequence of our decision today, of course, is that, unless the United States Supreme Court determines otherwise, individuals in Florida may well be executed for crimes similar to those committed by others who have been spared the death penalty. Disparities in sentencing will occur—despite all the rhetoric about death being different and the courts exercising special scrutiny to prevent arbitrariness—simply to preserve overriding societal needs.

1. Obviously, the Court has no control over federal district court judges who may grant review in post-conviction relief or habeas corpus proceedings. Knowing no practical way to avoid that result, I acknowledge that reality in the belief, nonetheless, that multiple reviews within the state court system are inimical to an effective criminal justice system.

2. One factor in aggravation was predicated on pending criminal charges, rather than prior convictions. See Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977). Two others were not included in the statutory list of aggravating circumstances. See Mikenas v. State, 367 So.2d 606 (Fla. 1978). I note that Sawyer's death sentence was later reduced to life imprisonment in a proceeding under Florida Rule of Criminal Procedure 3.800. State v. Sawyer, No. 73-1001-C (Cir. Ct.)(11th)(Aug. 6, 1976). Sentence review under that provision is however, no longer available for this purpose. The Florida Bar Re Fla. Rules of Criminal Procedure, 343 So.2d 1247 (Fla. 1977)

An Appeal from the Circuit Court in and for Hillsborough County,

Arden Mays Merckle, Judge - Case No. 73-2181D

Jack O. Johnson, Public Defender, and Paul C. Helm and James B. Wulchak, Assistant Public Defenders, Bartow, Florida,

for Appellant

Jim Smith, Attorney General, and Robert J. Landry, Assistant Attorney General, Tampa, Florida,

for Appellee

ARTICLE VI.

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

The senators and representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CHAPTER 921
SENTENCE

921.09 Fees of physicians who determine sanity at time of sentence.
921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.
921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.
921.15 Stay of execution of sentence to fine; bond and proceedings.
921.16 When sentences to be concurrent and when consecutive.
921.161 Sentence not to run until imposed; credit for county jail time after sentence; certificate of sheriff.
921.18 Sentence for indeterminate period for noncapital felony.
921.20 Classification summary; parole and probation commission.
921.21 Progress reports to parole and probation commission.
921.22 Determination of exact period of imprisonment by parole and probation commission.

921.09 Fees of physicians who determine sanity at time of sentence.—The court shall allow reasonable fees to physicians appointed by the court to determine the mental condition of a defendant who has alleged insanity as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—§238, ch. 19354, 1939; CGL 1940 Supp. 8863(264); §131, ch. 70-339.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—§238, ch. 19354, 1939; CGL 1940 Supp. 8863(267); §132, ch. 70-339.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trail jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life *[imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60

days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—§237a, ch. 19554, 1939; CGL 1940 Supp. 8663(246); §119, ch. 70-339; §1, ch. 72-72; §9, ch. 72-724.

*Note.—Bracketed word inserted by the editors.

Note.—See former §919.23.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in ninety days to the governor and his successors in office.

(3) If the bond is not paid at the expiration of ninety days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—§240a, ch. 19554, 1939; CGL 8436, 8437; CGL 1940 Supp. 8663(279); §122, ch. 70-339.

921.16 When sentences to be concurrent and when consecutive.—A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits, shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively unless the court directs that two or more of the sentences be served concurrently.

History.—§241, ch. 19554, 1939; CGL 1940 Supp. 8663(271); §124, ch. 70-339.

921.161 Sentence not to run until imposed; credit for county jail time after sentence; certificate of sheriff.—

(1) A sentence of imprisonment shall not begin to run before the date it is imposed, but the court imposing a sentence shall allow a defendant credit for all of the time he spent in the county jail before sentence. The credit must be for a specified period of time and shall be provided for in the sentence.

(2) In addition to other credits, a person sentenced to imprisonment in custody of the division of corrections of the department of health and rehabilitative services shall receive credit on his sentence for all time spent between sentencing and being placed in custody of the division of corrections. When delivering a prisoner to the division of corrections the sheriff shall certify in writing to the division:

(a) The date the sentence was imposed and the date the prisoner was delivered to the division.

(b) The dates of any periods after sentence the prisoner was at liberty on bond.

(c) The dates and reasons for any other times the prisoner was at liberty after sentence.

The certificate shall be prima facie evidence of the facts certified.

History.—§1, ch. 63-457; §§19, 35, ch. 69-106; §125, ch. 70-339; §1, ch. 70-441; §1, ch. 73-71.

XVI. CRIMINAL CONTEMPT

Rule 3.830. Direct Criminal Contempt

A criminal contempt may be punished summarily if the court saw or heard the conduct constituting the contempt committed in the actual presence of the court. The judgment of guilt of contempt shall include a recital of those facts upon which the adjudication of guilt is based. Prior to the adjudication of guilt the judge shall inform the defendant of the accusation against him and inquire as to whether he has any cause to show why he should not be adjudged guilty of contempt by the Court and sentenced therefor. The defendant shall be given the opportunity to present evidence of excusing or mitigating circumstances. The judgment shall be signed by the judge and entered of record. Sentence shall be pronounced in open court.

Committee Note

Same as prior rule.

Rule 3.840. Indirect Criminal Contempt

(a) **Indirect (Constructive) Criminal Contempt.** A criminal contempt except as provided in the preceding subsection concerning direct contempts, shall be prosecuted in the following manner:

(1) *Order to Show Cause.* The judge, of his own motion or upon affidavit of any person having knowledge of the facts, may issue and sign an order directed to the defendant, stating the essential facts constituting the criminal contempt charged and requiring him to appear before the court to show cause why he should not be held in contempt of court. The order shall specify the time and place of the hearing, with a reasonable time allowed for preparation of the defense after service of the order on the defendant.

(2) *Motions; Answer.* The defendant, personally or by counsel, may move to dismiss the order to show cause, move for a statement of particulars or answer such order by way of explanation or defense. All motions and the answer shall be in writing unless specified otherwise by the judge. A defendant's omission to file motions or answer shall not be deemed as an admission of guilt of the contempt charged.

(3) *Order of Arrest; Bail.* The judge may issue an order of arrest of the defendant if the judge has reason to believe the defendant will not appear in response to the order to show cause. The defendant shall be admitted to bail in the manner provided by law in criminal cases.

(4) *Arraignment; Hearing.* The defendant may be arraigned at the time of the hearing, or prior thereto upon his request. A hearing to determine the guilt or innocence of the defendant shall follow a plea of not guilty. The judge may conduct a hearing without assistance of counsel or may be assisted by the prosecuting attorney or by an attorney appointed for that purpose. The defendant is entitled to be represented by counsel, have compulsory process for the attendance of witnesses, and may testify in his own defense.

All issues of law and fact shall be heard and determined by the judge.

(5) *Disqualification of Judge.* If the contempt charged involves disrespect to or criticism of a judge he shall disqualify himself from presiding at the hearing. Another judge shall be designated by the Chief Justice of the Supreme Court.

(6) *Verdict; Judgment.* At the conclusion of the hearing the judge shall sign and enter of record a judgment of guilty or not guilty. There should be included in a judgment of guilty a recital of the facts constituting the contempt of which the defendant has been found and adjudicated guilty.

(7) *The Sentence; Indirect Contempt.* Prior to the pronouncement of sentence, the judge shall inform the defendant of the accusation and judgment against him and inquire as to whether he has any cause to show why sentence should not be pronounced. The defendant shall be afforded the opportunity to present evidence of mitigating circumstances. The sentence shall be pronounced in open court and in the presence of the defendant.

Committee Note

Same as prior rule.

XVII. POST-CONVICTION RELIEF

Rule 3.850. Motion to Vacate, Set Aside or Correct Sentence; Hearing; Appeal (See Rule 3.987 for form)

A prisoner in custody under sentence of a court established by the laws of Florida claiming the right to be released upon the ground that the judgment was entered or that the sentence was imposed in violation of the Constitution or Laws of the United States, or of the State of Florida, or that the court was without jurisdiction to enter such judgment or to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or that his plea was given involuntarily, or the judgment or

sentence is otherwise subject to collateral attack, may move the court which entered the judgment or imposed the sentence to vacate, set aside or correct the judgment or sentence.

A motion for such relief may be made at any time. The motion shall be under oath and include the following information:

(a) The judgment or sentence under attack and the court which rendered the same;

(b) Whether there was an appeal from the judgment or sentence and the disposition thereof;

(c) Whether a previous post-conviction motion has been filed, and if so, how many;

(d) The nature of the relief sought;

(e) A brief statement of the facts (rather than conclusions) relied upon in support of the motion.

The court will refuse to receive any motion filed pursuant to this rule which is not in substantial compliance with the requirements hereof.

If the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief, the motion shall be denied without a hearing. In those instances when such denial is not predicated upon the legal insufficiency of the motion on its face, a copy of that portion of the files and records which conclusively shows that the prisoner is entitled to no relief shall be attached to the order. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting attorney of the court, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant him a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing. The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the appropriate appellate court from the order entered on the motion as from a final judgment on application for writ of habeas corpus. All orders denying motions for post-conviction relief shall include a statement that the movant has the right to appeal within thirty days of the rendition of the order. The prisoner may file a motion for rehearing of an order denying a motion under this rule within fifteen days of the date of service of the order. The clerk of the court shall promptly serve upon the prisoner a copy of any order denying a motion for post-conviction relief or denying a motion for rehearing noting thereon the date of service by an appropriate certificate of service.

An application for writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this rule, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Amended Feb. 10, 1977, effective July 1, 1977 (343 So.2d 1247); Dec. 22, 1977, effective Jan. 1, 1978 (353 So.2d 552); March 7, 1980 (—— So.2d ——).

Committee Note

1972 Revision. Same as prior rule. Former Rule 3.860, previously deleted, now found in Article 18, The Florida Bar Integration Rules.

1977 Amendment (343 So.2d 1247). Nothing has been taken from proposed Rule 3.850. Additions have been made. The committee proceeded on the theory that generally the motions coming under the purview of the rule were filed by prisoners and will be considered ex parte.

The proposed amendment contemplates that in those cases where the trial court found the movant entitled to some relief, the State Attorney would be noticed and given an opportunity to be heard. The rule further contemplates that if the appellate court reverses, it would do so with directions to conduct a hearing with notice to all parties.

(a), (b), (c), (d), (e)

The committee was of the opinion that the motion should contain the minimum prerequisites indicated in the lettered portions to permit the trial court to quickly ascertain whether or not the motion was entitled to consideration, and if not, provide for its return to the movant as unacceptable. This procedure is similar to Federal rules dealing with post-conviction motions.

The committee perceives that denial of a motion will either be based on the insufficiency of the motion itself or on the basis of the file or record which the trial court will have before it. The proposal provides for a simplified expeditious disposition of appeals in such cases. It is to be noted, however, that in those cases where the record is relied upon as a basis for denial of the motion, it may in exceptional cases involve a substantial record but the advantages of this procedure seem to justify coping with the unusual or exceptional case. It is the opinion of the committee that trial courts will in any order of denial based upon the insufficiency of the motion or on the face of the record, set forth specifically the basis of the court's ruling with sufficient specificity to delineate the issue for the benefit of the appellate courts.

The committee thought that the provision permitting ex parte denial of a motion based on the face of the record was appropriate inasmuch as the movant was granted an opportunity for rehearing in which he could point out any errors the court may have made, thus providing sufficient safeguards to insure consideration of the prisoner's contentions.

The prisoner or movant's motion for rehearing will be a part of the record on appeal, thereby alerting the appellate court to the movant's dissatisfaction with the trial court's ruling.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JAMES DUPREE HENRY,

Petitioner,

vs. No. 79-584-Orl-Civ-R

LOUIE L. WAINWRIGHT,
Secretary, Department
of Corrections,

Respondent.

FILED
ORLANDO, FLA.
FEB 14 1980
WESLEY R. THIES
CLERK

MEMORANDUM OF DECISION

Summary of Decision: In connection with the petition by James Dupree Henry for the issuance of a writ of habeas corpus, this court has conducted an evidentiary hearing and reviewed the entire trial transcript and the briefs of the parties. Based thereon, the court finds that no error was committed by the trial court of such a nature as to invalidate the conviction. The court did find, however, that the trial court committed an error in instructing the jury at the sentencing hearing. The erroneous instruction effectively denied the Petitioner the right to a sentencing hearing conducted in compliance with the applicable statutes of the State of Florida. The error, therefore, denied the Petitioner due process and equal protection of the law of the State of Florida. Hence, it is the conclusion of this court that the State should afford the Petitioner another sentencing hearing at which the jury will be correctly instructed as to the matters upon which it may

base its sentencing recommendation. This court will issue the writ of habeas corpus only if such hearing is not afforded the Petitioner within ninety days from the date hereof.

Introduction: On 26 June 1974, the Petitioner was convicted by a jury of first degree murder in the Circuit Court for Orange County, Florida. The trial court sentenced the Petitioner to death by electrocution. The Petitioner appealed the conviction to the Supreme Court of Florida which affirmed the judgment, Henry v. State, Fla. 1975, 328 So.2d 430. A petition for certiorari to the United States Supreme Court was denied, 1976, 429 U.S. 951; reh. denied, 1977, 429 U.S. 1124. On 31 October 1979, Petitioner filed a motion to vacate the judgment pursuant to Florida Rule of Criminal Procedure 3.850 in the Circuit Court for Orange County, Florida. The trial court denied the motion on 19 November 1979, and its denial was affirmed by the Florida Supreme Court on 27 November 1979. Henry v. State, 1979, ____ So.2d ____.

The petition for a writ of habeas corpus was filed in this court on 27 November 1979. The record before this court consists of:

(1) The transcript of the testimony before the Orange County Circuit Court at the

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time of trial, reference to which will be designated as "Tr.";

(2) The transcript of the testimony before the Circuit Court of Orange County, Florida, taken in a pre-trial hearing on Petitioner's motion to suppress, reference to which will be designated "S. Tr.";

(3) The transcript of the record before the state trial court, reference to which will be designated "Transcript of Record";

(4) Petitioner's brief before the Florida Supreme Court on his original direct appeal and the State's brief on Petitioner's appeal from the denial of the Rule 3.850 motion;

(5) The evidence presented before this court on 11 January 1980.

The grounds on which the Petitioner relies for relief will be discussed in the order in which they appear in the petition filed herein.

Point 1

The Petitioner's first ground for relief is that his post-arrest confession which was admitted in evidence (Tr. p. 244) was involuntary and should have been suppressed by the trial judge.

No evidence was introduced at the evidentiary hearing before this court to support this ground. The following is the evidence that was before the state trial judge in connection with the motion to suppress the confession.

John Matthews, the arresting officer, testified that he arrested the Petitioner on the 28th of March 1974

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at approximately 12:10 P.M. He brought Petitioner to the Orlando Police Station for "booking" at about 12:15 P.M. At the booking office the Petitioner was advised of his Miranda rights (S. Tr. p. 8) and acknowledged he understood them (S. Tr. p. 10). After having been read his rights, Petitioner signed the back of a Miranda card indicating that he understood his rights (S. Tr. p. 10). Officer Matthews testified that he offered no inducements to obtain the signature of the Petitioner on the Miranda card.

The Petitioner gave somewhat contradictory testimony. At first he testified (S. Tr. p. 94) that he was advised by Officer Matthews that he had a right to remain silent. He then testified that Officer Matthews did not verbally advise him of his rights, but that he put a Miranda card in front of him and that he, the Petitioner, did not read it because he thought that the card stated that he had the privilege of having a lawyer and did not need to say anything he did not wish to say (S. Tr. p. 95).

After the "booking" procedure, according to the testimony of Officers Charles R. Ings and R. D. King of the Orlando Police Department, the Petitioner was taken to a conference room at the Orlando Police Department.

Before the questioning commenced, King advised the Petitioner that he was charged with the first degree murder of Z. L. Riley and the shooting of a police officer (Tr. p. 23 and S. Tr. pp.22-23) and Ings advised the Petitioner a second time of his Miranda rights by reading to

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him a yellow Miranda card (S. Tr. p. 17). After reading the card to him, Ings asked the Petitioner to sign it. Following the signing of the Miranda card, King and Ings, according to Ings' testimony, questioned the Petitioner about his involvement in the robbery and murder of Z. L. Riley. At first Petitioner refused to admit any involvement. He then admitted that he had been in Riley's house and at about 4:00 P.M. he gave the incriminating statement which was tape recorded, transcribed, and signed by Petitioner. During the course of the interview which preceded the giving of the taped statement, Officer Ings advised the Petitioner that if he cooperated, his cooperation would be made known to the State Attorney's office (S. Tr. p. 19).

According to Ings, as the discussion progressed the Petitioner stated that he wished the officers to have a prayer with him. At this point Investigator King said a prayer with the Petitioner and immediately thereafter Petitioner confessed to the offense.

Henry testified that the prayer session had no influence on his willingness to make a confession. He testified:

. . .

"A. Well, I was crying, and it wasn't the part of the prayer, it was the part of them going through all of this and if I still said, no, then I felt like they would do something to me.

Q. Do you feel that the prayer session and the discussion about religion

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influenced the fact that you did make a statement to them?

A. Well, I would say not just a prayer, but the way they did it . . . you know . . . they kind of forced me to make a confession."

(S. Tr. pp. 86-87).

Additionally, Henry testified that Officer King ". . . was squeezing on my shoulder . . . you know . . . I mean, to me . . . I mean . . . in my mind I felt like if they were going to all this trouble of trying to make me say something and I refused, that they might do something to me . . . you know . . . so, this is why I went on and said that I would make the Confession. . . ."

From Petitioner's testimony, it appears without contradiction that at the time of the interview between him and Officers Ings and King, Henry was twenty-four years of age and had recently been released from the Florida State Penitentiary at Raiford following a conviction based on a plea of guilty. He was able to read and had been through the tenth grade (S. Tr. pp. 77, 94).

Petitioner testified in the trial court on the motion to suppress that during the course of his interview with King and Ings, Ings said it would be easier on him to tell what happened, and when King asked if Henry would like to make a statement, Henry replied that he would like to see a lawyer to which the officers made no verbal response.

According to Officer Ings, Petitioner never

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indicated to him that he desired to speak to an attorney or mentioned the name of an attorney. The testimony of Investigator King basically coincides with that of Officer Ings, except that when asked whether or not Petitioner requested an attorney, Officer King responded, "I don't remember anything, no sir". (S. Tr. pp.55, 56).

After hearing the testimony and observing the witnesses, the trial judge denied the motion to suppress (S. Tr. p. 107). In so doing the trial judge was acting within the realm of reason in disbelieving the testimony of Petitioner to the effect that he requested representation by an attorney. No testimony was presented to this court that would justify a different conclusion. The trial court's credibility choice is supported by the Petitioner's interest and by the fact that Petitioner was aware by virtue of two warnings that he had the right to remain silent, the right to an attorney, and the right to halt the interrogation.

The fact that Officer Ings told the Petitioner that his cooperation would be made known to the State Attorney was not such an inducement as to render the confession involuntary as a matter of law (see United States v. Curtis, CA9, 1977, 562 F.2d 1153, and United States v. Barfield, CA5, 1975, 507 F.2d 53, cert. denied 421 U.S. 950) and, as a matter of fact, there was ample evidence before the trial court from which it could have found by a preponderance of the evidence that the confession was

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the voluntary act of the Petitioner. Such a finding could have been based on the age of the Petitioner, his prior prison experience, the adequacy of the warnings given, the fact that he had been familiar with one of the interrogating police officers from childhood, and the absence of any physical abuse, actual or threatened, during the interview. The finding of voluntariness which is implicit in the trial judge's denial of the motion to suppress is entitled to a presumption of correctness in this proceeding. See Blasingame v. Estelle, CA5, 1979, ____ F.2d ____, and 28 U.S.C. § 2254(d). The burden here rests on the Petitioner to establish that the trial judge's determination was erroneous, and he has failed to carry this burden with respect to the voluntariness of the confession. Webster v. Estelle, CA5, 1974, 505 F.2d 926; cert. denied 421 U.S. 918.

The Petitioner also argues that the trial judge denied him due process of law by failing to make written findings of fact and conclusions of law in connection with the ruling on the motion to suppress. In support of this argument, Petitioner cites Jackson v. Denno, 1964, 378 U.S. 368, and Sims v. Georgia, 1967, 385 U.S. 538. Neither of these cases stands for the proposition that a state trial judge must make formal findings of fact or conclusions of law when ruling on a motion to suppress. In fact, Sims v. Georgia is exactly to the contrary. The two opinions taken together simply require that before a confession is introduced into evidence, the trial court determine its voluntariness and that the conclusion of the trial judge appear

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from the record with unmistakable clarity.

The Petitioner's first ground for relief is, therefore, without merit.

Point 2

The second ground on which the Petitioner relies for relief is that the imposition of the death penalty would be cruel and unusual in violation of the Eighth Amendment to the United States Constitution because the conviction did not necessarily involve a finding of a deliberate taking of human life. Under the instructions given the jury (Tr. pp.360, 362, 366) the jury could have convicted the Petitioner of first degree murder on the basis of a finding either that the Petitioner premeditated the killing of Z. L. Riley or that the Petitioner killed Mr. Riley without a premeditated design during an attempt to rob him.

The jury's verdict is general in nature and does not specify the factual theory on which it concluded that first degree murder occurred (Tr. p. 384). A review of the testimony, however, makes it plain that the jury could have found beyond a reasonable doubt that the killing was premeditated and was committed in the commission of a robbery. It is readily inferable from the confession that after the Petitioner entered Mr. Riley's home and beat him into a state of unconsciousness, he formulated the intent to take Mr. Riley's life to avoid detection.

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There is no authority to support Petitioner's contention that the imposition of a death penalty for such an offense is cruel and unusual. Whether or not the imposition of death for a murder is cruel and unusual within the meaning of the Eighth Amendment depends upon evolving standards of decency. The best evidence, however, of the evolving standards of decency is the fact that the legislatures in numerous states since Furman v. Georgia, 1972, 408 U.S. 238, have enacted statutes which impose the death penalty for killings committed in the commission of serious felonies. (See footnote 23. at page 179 in the opinion of the United States Supreme Court in Gregg v. Georgia, 1976, 428 U.S. 153. Since that opinion was published, the Commonwealth of Massachusetts has adopted capital punishment for first degree murder. See Ch. 488, Mass. Session Laws, 1979.) Additionally, Congress has chosen to provide the death penalty for a killing, whether premeditated or not, caused by one in the commission of air piracy. See 49 U.S.C.A. § 1472(i).

The court has not overlooked the concurring opinion of Mr. Justice White in the case of Lockett v. Ohio, 1978, 438 U.S. 586, 628. The opinion, however, is not binding authority inasmuch as it was a concurring opinion in which no other justice joined.

This court concludes that the second point is without merit as a matter of law.

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Point 3

The third ground for relief is that the trial judge in instructing the jury at the sentencing stage of the trial did not instruct the jury that the aggravating circumstances which justify the death penalty must be proved beyond reasonable doubt. See F.S. 1973, Section 921.141(5). The Petitioner makes the related contention that the trial judge himself did not adhere to this standard of proof. With regard to the latter contention, support for same does not appear from the record of the trial proceedings.

With regard to the instructions to the jury at the sentencing phase of the trial, it is true that the trial judge did not instruct the jury that the aggravating circumstances must be found beyond reasonable doubt. The failure of the court to so instruct the jury was error. See State v. Dixon, Fla. 1973, 283 So.2d 1. It was, however, harmless beyond reasonable doubt.

The aggravating circumstances which were depicted in the record were in fact proved beyond reasonable doubt. The aggravating circumstances were basically the heinousness of the crime which was shown through the Petitioner's own confession and the testimony of the Orange County Medical Examiner, Dr. Hegert (Tr. p. 203); the fact that the Petitioner had been convicted of two prior felonies involving the use or threat of violence to a person, and the fact that the felony was committed

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for pecuniary gain in the course of a robbery and to avoid a lawful arrest. The court concludes that any error of the trial judge in not instructing the jury on the use of the reasonable doubt standard at the sentencing phase of the trial was harmless beyond reasonable doubt.

Point 4

The Petitioner's fourth point is that the trial judge committed error in allowing the jury to consider aggravating circumstances which did not fall within the terms of F.S. 1973, 921.141(5). Section 921.141(5), F.S. 1973,* provided that, "Aggravating circumstances shall be limited to the following (emphasis added) . . ." and then defined eight circumstances which could be considered in favor of imposing the death penalty. Despite the statute's clear wording, the trial judge instructed the jury at the sentencing hearing in part as follows:

> ". . . You will render an advisory sentence to the court based upon the following matters:
>
> Whether sufficient aggravating circumstances exist, or sufficient mitigating circumstances exist for you to recommend the death penalty or life imprisonment.
>
> In considering aggravating circumstances, you shall consider all factors which are aggravating including, but not limited to, the following: . . .".
>
> (Tr. p. 410, emphasis added).

Thereafter, the court's charge delineated the aggravating

---

* The full text of Section 921.141, F.S. 1973, is attached to this Memorandum of Decision as an appendix hereto.

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and mitigating circumstances set out in Section 921.141, F.S. 1973.

The Petitioner contends that the instruction was error because it permitted the jury to consider and base a sentencing verdict on the testimony of Orlando policeman Ronald Ferguson presented at the sentencing hearing. At the sentencing hearing Officer Ferguson, over defense objection (Tr. p. 387), testified about the effort of the Petitioner to avoid arrest. The officer testified that in the course of a fight attendant upon his attempt to arrest the Petitioner, the Petitioner took the officer's gun. At this point the officer ran around his car, crossed the street and jumped a fence. As the officer jumped the fence, Henry fired a shot which hit the officer in the back (Tr. pp.388-389). Thereafter, Henry pursued the officer into Sunset Drive and fired another shot which missed. The officer continued to run, but Henry eventually caught up with the officer and struck him in the forehead with the gun. The gun went off and the concussion knocked the officer to the ground (Tr. pp. 389-390). With the officer on the ground, Henry fired the gun into the officer's right collarbone and immediately fled (Tr. pp.389-390).

The trial court's instruction was erroneous because it did not limit the jury to a consideration of the aggravating circumstances listed in Section 921.141(5), Florida Statutes 1973, and thereby permitted the jury to

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base its sentencing verdict on a non-statutory aggravating circumstance, namely Henry's assault on Officer Ferguson. See Purdy v. State, Fla. 1977, 343 So.2d 4, and Elledge v. State, Fla. 1977, 346 So.2d 998.

The error in the court's charge cannot be ignored on the ground that it was not objected to. The objection raised by counsel for Henry to Officer Ferguson's testimony at the sentencing hearing was sufficient to put the trial court on notice of the defense objection not only to that testimony but to any charge that would permit the jury to consider such testimony (Tr. pp.387-388). The difficult issue is whether or not the trial judge's instruction can be viewed as harmless error beyond reasonable doubt. Harryman v. Estelle, CA5, 1979, 597 F.2d 927.

The trial judge found that none of the statutory mitigating circumstances existed. This finding, however, does not resolve the issue for two reasons. First, under the provisions of Section 921.141, Florida Statutes 1973, the jury is obligated to make an independent analysis of the evidence. In the present case, the jury, as opposed to the trial judge, may well have found some mitigating factor in the evidence. Its vote of seven to five in favor of the death penalty tends to support that possibility. Secondly, even in the absence of mitigating circumstances, the Florida statute does not contemplate the automatic imposition of the death penalty on a finding of one or more aggravating circumstances. As the Florida

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Supreme Court pointed out in State v. Dixon, 1973, 283 So.2d 1, 10:

> "It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present."

Thus even where only aggravating circumstances are present, the judge and jury must make a reasoned evaluation of the circumstances to determine whether they require the imposition of the death penalty.

The court's instruction to the jury left it free not only to consider non-statutory aggravating circumstances, but matters entirely outside the record. At one point during the course of its deliberations, the jury returned with a question which indicated that it in fact had considered matters outside the record, such as the possibility of release short of the completion of the life sentence.

In Elledge v. State, Fla. 1977, 346 So.2d 998, the defendant was on trial for the murder and rape of a female. Shortly after the murder-rape occurred, the defendant killed a man in a robbery the purpose of which was to obtain funds to escape from the area where the murder-rape was committed. At the sentencing hearing

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which followed his conviction for the murder-rape, evidence of the robbery and the second murder was erroneously admitted for consideration by the jury. The jury by a vote of eleven to one recommended the death penalty and the trial judge so sentenced the defendant. Nevertheless, the Supreme Court of Florida refused to apply the harmless error principle. The Court stated:

> "Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the factor of the Gaffney murder shall not be considered."

The present case is no more amenable to the application of the harmless error doctrine than Elledge v. State. In the present case, had the jury been properly instructed and guided at the sentencing hearing, it is entirely possible that its recommendation might not have been for the imposition of the capital penalty. In any event, it is clear that the court cannot categorize the error in the jury charge and the admission of Officer Ferguson's testimony at the sentencing hearing as harmless beyond reasonable doubt. For that reason, this court concludes that the State should accord the Petitioner an opportunity for a new sentencing hearing at which the jury will be properly instructed and the evidence as to the assault on Officer Ferguson will be excluded from the

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jury's consideration.

Point 5

Under the fifth point, the Petitioner argues that the trial judge used the underlying robbery along with the pecuniary motive as two aggravating circumstances whereas it should be counted only as one. It is immaterial in the opinion of this court whether the underlying robbery was counted as one or two aggravating circumstances, because only one aggravating circumstance is required to justify the imposition of the death penalty.

The Petitioner also contends under his fifth point that the trial judge limited his consideration of mitigating circumstances to those set out in the statute. This contention is not supported by the record. The trial judge advised the jury that it could consider all circumstances in mitigation (Tr. p. 411) and permitted testimony to be presented by the Petitioner at the sentencing phase with respect to his character and background (Tr. pp. 393-399).

Additionally, under the fifth ground the Petitioner argues that the judge did not find either that the killing was intentional or the aggravating circumstances beyond reasonable doubt.

Suffice it to say at this point that there was no requirement by statute, case law, or Constitution that the trial judge make a finding that the killing was intentional. Secondly, although the judge did not expressly

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state that he found the aggravating circumstances beyond reasonable doubt, it does not follow that this standard of proof was not followed by the judge and jury. The contentions under Point 5 are without merit.

Point 6

Petitioner's sixth point charges that he was denied effective assistance of counsel because counsel failed to ask for an instruction on the burden of proof at the sentencing hearing and failed to object to the trial court's instruction previously quoted with respect to aggravating circumstances.

Constitutionally, the Petitioner is simply entitled to the services of an attorney who is reasonably likely to render effective assistance and who in fact renders reasonably effective assistance. Herring v. Estelle, CA5, 1974, 491 F.2d 125. A transcript of the trial leaves this court with the conclusion that reasonably effective assistance was furnished. The public defender who represented the Petitioner was obviously versed on the law dealing with first degree murder and the sentencing provisions associated therewith, was well versed on the facts of the case, and appropriately cross-examined witnesses for the State.

The failure of counsel to request an instruction that the aggravating circumstances be proved beyond reasonable doubt, as they must be under the case of State v. Dixon, Fla. 1973, 283 So.2d 1, 9, was an understandable

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omission simply because there was no factual issue with respect to the aggravating circumstances. For that reason, counsel's failure did not render him ineffective.

The other omission which is charged as ineffective assistance of counsel is the failure of the public defender to object to the instruction on aggravating circumstances because the instruction did not limit the jury to the aggravating circumstances set forth in the statute. Counsel objected to the testimony of Officer Ferguson at the sentencing hearing (Tr. pp. 387-388). That objection, as noted above, sufficed to put the trial court on notice of the defense objection to the instruction.

Point 7

The seventh point asserted by the Petitioner is that the indictment did not set out the aggravating circumstances on which the State would rely in asking for the death penalty and that the Petitioner was not otherwise given notice of them. This objection is not valid. The Petitioner, like any other person indicted for first degree murder, is put on notice by the statute itself of the aggravating circumstances which may be considered in support of the death penalty.

Point 8

The Petitioner's eighth point is that the death penalty is being capriciously applied in Florida because the Florida Supreme Court employs two vastly different

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standards of review, depending on whether or not the jury recommends life or death.

A review of the two Florida cases on which the Petitioner relies does not support his conclusion. In Tedder v. State, Fla. 1975, 322 So.2d 908, 910, the Florida Supreme Court had before it a case in which the trial judge imposed the death penalty contrary to the jury recommendation. In that case the Court held:

> ". . . A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. . . ."

In LeDuc v. State, Fla. 1978, 365 So.2d 149, 151, wherein the trial judge had sentenced the defendant to death following a jury recommendation consistent therewith, the Florida Supreme Court stated:

> ". . . The primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation. . . ."

These two opinions do not indicate a substantially different standard of review depending on the jury's finding. The significance of the opinions simply is that jury recommendations should be adhered to unless there is cogent

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reason to believe that the recommendation is inconsistent with the views of reasonable persons. The eighth point is without merit.

Point 9

The Petitioner contends that the Florida death penalty statute is unconstitutional on its face because it does not provide a standard by which the judge and jury can determine whether or not the aggravating circumstances outweigh the mitigating circumstances. The argument, when reduced to its essence, is simply that where the ultimate decision to impose or not to impose the death penalty is vested in the discretion of a sentencer, the death penalty is unconstitutional. This argument has been rejected by the United States Supreme Court where the sentencer's discretion is guided by statutorily articulated standards which in and of themselves are reasonable.

In Gregg v. Georgia, 1976, 428 U.S. 153, 197, the United States Supreme Court in its plurality opinion stated:

> ". . . As a result, while some jury discretion still exists, 'the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application.' . . ."

Furthermore, Petitioner's contention was implicitly rejected in Proffitt v. Florida, 1976, 428 U.S. 242, wherein six justices of the Supreme Court reviewed the Florida statutory aggravating and mitigating circumstances and

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concluded that they were not so broad as to render the statute unconstitutional.

Point 10

Under his tenth ground, the Petitioner contends that execution by electrocution is cruel and unusual per se and, therefore, a violation of the Eighth Amendment. This claim has been resolved against the Petitioner's position in Ex Parte Kemmler, 1889, 136 U.S. 436.

Under his tenth point, the Petitioner also contends that the death penalty is disproportionately applied in Orange County, Florida. To support this claim, the Petitioner presented the testimony of William Bowers and Glen Pierce. Mr. Bowers, a sociology professor from Northeastern University, testified that he directed a study covering a period from 1973 through 1977 and "the first few months" of 1978. He testified that the study covered thirty-one counties in the State of Florida and focused on the sentencing stage of first degree murder trials.

Glen Pierce, also a sociologist working on a doctorate at Northeastern University, testified that he prepared a statistical analysis of the data gathered by Mr. Bowers. According to the analysis prepared by Mr. Pierce, Orange County, during the study period,returned ninety-two indictments charging first degree murder. According to Mr. Pierce's data, there were thirty-six convictions on these indictments and fifteen death sentences.

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By comparing this data to similar data gathered with respect to other counties, Pierce concluded that in Orange County 16.3% of all capital indictments result in a death sentence, whereas the all-county average was 9.1%. Additionally, he concluded that 41.7% of all convictions in Orange County resulted in the death penalty, whereas 24.3% of the convictions in other counties resulted in the death penalty.

The factual accuracy of the testimony of Mr. Pierce was discredited by the testimony of John Fosnacht. Mr. Fosnacht is the administrative officer in charge of the records of the Felony Division of the Circuit Court for Orange County, Florida. He testified from an examination of the grand jury records for the period from 1973 through 1978 and found that during the study period utilized by Pierce and Bowers, grand juries in Orange County returned one hundred six indictments charging capital felonies - not ninety-two as assumed by Mr. Pierce - and that there were fifty-two convictions - not thirty-six as assumed by Mr. Pierce - and that there were fourteen cases in which the death penalty was imposed - not fifteen as assumed by Mr. Pierce. Thus, using Mr. Fosnacht's figures, the rate at which the death penalty was applied to capital convictions in Orange County would be in line with the rate which Mr. Pierce testified was prevalent throughout the other counties and regions which he studied.

Furthermore, even if the death penalty were

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imposed more frequently in Orange County than in other counties, this fact alone would not warrant a conclusion that the death penalty statute is unconstitutional in its application. The statute contains provisions for a mandatory review by the Florida Supreme Court to avoid disparate application of the statute on a statewide basis. Given this safeguard, the statute in operation is not unconstitutional.

The Petitioner in this case presents an argument with respect to disparate application which was essentially rejected as a matter of law in Spinkellink v. Wainwright, CA5, 1978, 578 F.2d 582, 613. There the Court held:

> ". . . As we previously noted, this Court reads Furman, Gregg, Proffitt, Jurek, Woodson and Roberts as holding that if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness - and therefore the racial discrimination - condemned in Furman have been conclusively removed. . . ."

This holding applies equally to discrimination based on geography.

The court concludes that the tenth ground for relief is without merit.

DONE AND ORDERED in Chambers at Orlando, Florida, this 14th day of February, 1980.

Judge

P-034-B

Copies mailed to:

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and
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P-034-B

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-233

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THE PEOPLE OF THE STATE OF MICHIGAN

Petitioner

vs.

WILLIE ELLIS JAMES WALTON

Respondent

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF
THE STATE OF MICHIGAN

MOTION TO PROCEED IN FORMA PAUPERIS

NOW COMES your Respondent, WILLIE ELLIS JAMES WALTON, by and through his attorney, Steven Rabinovitz, and in support of his motion to proceed in forma pauperis says as follows:

1) That he is the respondent in the pending proceeding.

2) That he has substantial interest in responding to said petition and showing this Court why said petition should not be granted.

3) That respondent is without funds to hire an attorney or to file a formal response as required under Rule 22 fo the Rules of the Supreme Court.

4) That respondent requested appointment of counsel to prepare post conviction proceedings following his conviction in the Recorder's Court for the City of Detroit, which request was granted by said court.

WHEREFORE, respondent prays that he be permitted to proceed in forma pauperis as provided in Rule 46 of the Rules

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of the Supreme Court.

Respectfully submitted,

BERNSTEIN & RABINOVITZ, P.C.

BY: Steven Rabinovitz

Steven Rabinovitz
Attorney for Respondent
28091 Dequindre, Ste 206
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Respondent

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF
THE STATE OF MICHIGAN

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

WILLIE ELLIS JAMES WLTON, being first duly sworn, deposes and says as follows:

1) He is the respondent in the above-entitled action and makes this Affidavit in support of his Motion for Leave to Proceed in Forma Pauperis.

2) Affiant is unable, because of his poverty, to pay fees and costs of this case or give security therefor.

3) This is in response to a Petition for Writ of Certiorari to the Court of Appeals of the State of Michigan, reversing Affiant's conviction and barring retrial on a dismissed count, and raises substantial question of constitutional law, as more fully set forth in Petitioner's Application previously filed. Affiant believes he is entitled to respond to said Petition.

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Further deponent sayeth not.

Willie Ellis James Walton

WILLIE ELLIS JAMES WALTON

Subscribed and sworn to before me this 21st day of November, 1980.

Yvonne Marie Gerace

NOTARY PUBLIC

YVONNE MARIE GERACE
Notary Public, Macomb County, Michigan
My Commission Expires March 14, 1981
ACTING IN WAYNE COUNTY

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TO THE COURT OF APPEALS OF
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RESPONDENT'S REPLY IN OPPOSITION

BERNSTEIN & RABINOVITZ, P.C.
Attorney for Respondent

By: _____
STEVEN RABINOVITZ, P 19174
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Respondent

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF
THE STATE OF MICHIGAN

RESPONDENT'S REPLY IN OPPOSITION

NOW COMES Respondent, WILLIE ELLIS JAMES WALTON, by and through his attorney, Steven Rabinovitz, in reply to a Petition for Writ of Certiorari to review the judgment of the Court of Appeals of the State of Michigan, entered in the above-entitled cause on January 10, 1980, leave to appeal denied by the Michigan Supreme Court on June 10, 1980, and prays that said Writ be denied.

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RE-STATEMENT OF QUESTION PRESENTED

WHERE DEFENDANT'S CONVICTION ON ONE COUNT ON A WAIVER TRIAL IS REVERSED DUE TO A STATUTORY DEFECTIVE JURY WAIVER, IS RE-TRIAL BARRED ON A SECOND COUNT ON WHICH THE DEFENDANT WAS ACQUITTED ON PRINCIPALS OF DOUBLE JEOPARDY?

REASONS FOR DENYING THE WRIT

The petitioner relies on Serfass v United States, 420 US 377, 95 S Ct 1055, 43 LEd2d 265 (1975) to support the proposition that the trial court in the instant case had no jurisdiction to determine the guilt or innocence of the defendant. However, it should be remembered that in Serfass, the appeal was from a decision of the trial court dismissing the indictment based on a stipulation of facts between the defendant and the prosecution. Had the trial court's decision been to deny the motion the defendant would have proceeded to trial but would not have been found guilty. Clearly, in such a situation, jeopardy had not attached.

Quite the contrary is true in the instant case when defendant in fact has been arraigned on the information, pleaded on the information and went to trial. The general rule as to when jeopardy attaches in a non-jury trial is where the "accused has been indicted and arraigned, has plaeded and the court has begun to hear evidence", McCarthy v Zerbst, 85 F2d 640, 642 (CA 10 1936).

Certainly the instant situation is more synonomous with the holdings in United States v Hill, 473 F2d 759 (1972), United States v Findley, 439 F2d 970 (CA 1 1971) and United States v Sisson, 399 US 267, 26 L Ed2d 608, 90 SCt 2117 (1970), all of which specifically held held jeopardy to have attached

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where the trial court began to hear evidence of facts outside of the indictment. Indeed, if the petitioner's position were to be upheld it would permit appeals by the prosecution of a not guilty verdict if the prosecutor felt there was any error in the selection of the fact finder. Such certainly was not the intention of Serfass.

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CONCLUSION

WHEREFORE, for the foregoing reasons, respondent requests that plenary review be denied.

Repectfully submitted,

BERNSTEIN & RABINOVITZ, P.C.

By: _____

STEVEN RABINOVITZ, P 19174
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28091 Dequindre, Ste 206
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Dated:November 21, 1980

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SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-233

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Petitioner

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Respondent

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF
THE STATE OF MICHIGAN

AFFIDAVIT OF MAILING

NOW COMES, Yvonne Gerace , being first duly sworn, and deposes and says that on the 21st day of November, 1980, she did serve upon:

Ms. Anne B. Wetherholt
Assistant Prosecuting Attorney
for Wayne County
12th floor
Frank Murphy Hall of Justice
1441 St. Antoine
Detroit, Mich. 48226

the following Respondent's Reply in Opposition to a Petition for Writ, Motion to Proceed in Forma Pauperis, Affidavit in Support of Motion and Affidavit of Mailing, by placing same in the regular United States Mail, properly addressed and with sufficient postage thereon.

Yvonne Gerace

STATE OF MICHIGAN)
)SS
COUNTY OF OAKLAND

Subscribed and sworn to before me this 21st day of November, 1980.

STEVEN RABINOVITZ
Notary Public, Oakland Co., Mich.
My Comm. Expires July 19, 1983

NOTARY PUBLIC

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